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DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875.[1]

PART II.

HAVING already sufficiently considered how and why the common-law system of pleading differs from that of the civil and canon law, it remains to inquire how the peculiarities of the former affect the subject of discovery. The inquiry is embarrassed by what may be termed the modern degeneracy of the common-law system. If the question could be limited to the period of time when that system was still in its full vigor, the answer would be easy. First, it would be clear that neither party would be entitled to any discovery until the pleadings were finished, for until then it could not be known what discovery would be needed, nor even whether any would be needed. Secondly, the question what discovery would be needed, and what, therefore, the parties respectively would be entitled to, would depend, not upon the allegations made in the respective pleadings, or any of them, but upon the question on which the parties were at issue, and therefore the amount needed would be small in comparison with the amount needed in the civil and canon law. Thirdly, discovery would not be needed for the purpose of eliminating the uncontroverted facts, as that would be sufficiently done by the pleadings. Fourthly, as the question to

[1] Continued from page 157.

be tried would be as to the truth of a matter alleged by one of the parties, and indispensable to his case or defence, and upon a denial of which the other party was willing to rest the entire case, it would seldom be worth the while of either of the parties to attempt to prove by discovery anything which he could prove by witnesses.

What then was the effect of the relaxation which the system gradually underwent? Perhaps that question can best be answered by first asking what would have been the effect upon discovery of a complete abrogation of the rule against pleading double; for the answer to that question is easy. There would then be no compulsion upon either party to admit (by not denying) the truth of anything alleged by his adversary; and, as litigants do not as a rule (any more than military commanders) do anything voluntarily to help their adversaries, it must be assumed that, in the case supposed, everything alleged by either of the parties would be denied by the other. Therefore, as regards the amount of proof which would be required from the parties respectively (and therefore as regards discovery), the abrogation of the rule against pleading double would be the abrogation of everything peculiar to the common-law system, and the parties would be left in the same position as in the civil and canon law, i. e., each of them would have to prove everything alleged by him. What then would be the effect upon discovery of any partial abrogation of the rule against pleading double? It would depend upon the degree in which the partial abrogation left each party free to deny everything alleged by his adversary. It should be observed, however, that neither a partial nor a total abrogation of the rule would enable any one to say with certainty, in any given case, how much or what discovery would be needed, until the pleadings were finished; for no one could say with certainty that each of the parties would deny everything that he was free to deny, nor whether or to what extent any restraint which might still remain would be sufficient to prevent a denial.

Would the partial or total abrogation of the rule against pleading double affect the time at which the parties respectively would be entitled to discovery? It would still be true that each material and issuable allegation would be constructively admitted, unless it was separately traversed, and that upon each traverse an issue would arise. If, therefore, a defendant pleaded both affirmatively and negatively to the plaintiff's declaration, while the pleadings would continue in respect to the affirmative plea, they would cease, and

the parties would be at issue, in respect to each traverse. In short, a necessary consequence of the defendant's pleading both affirmatively and negatively would be that there would be at least two issues to be tried, and that they would arise at different times; and of course the same thing would be true in case of an affirmative and negative answer to any pleading subsequent to the declaration. Moreover, upon strict principle, it would seem to be clear that, whenever there are two or more issues in an action, the parties are respectively entitled to discovery upon each issue as soon as it arises.

We now at length reach the subject of discovery in the Court of Chancery. It has been already stated that the system of pleading used in that court was a borrowed one, and that the Court of Chancery was indebted for it partly to the ecclesiastical courts and partly to the common law; and it may now be added that, in its original form, the system was borrowed entirely from the ecclesiastical courts, and that the only parts of it which were borrowed from the common law (namely, pleas and demurrers) came in at a later date, and did not affect or interfere with the operation of the original system otherwise than by suspending it whenever they were employed.

Accordingly, the original system consisted entirely of a series of affirmative pleadings, and of course there were no constructive admissions. Soon, however, it underwent an alteration in form, which greatly changed its outward aspect. In the civil and canon law, as has been seen, the pleadings were, during their progress, under the constant supervision and control of the court, and if the Court of Chancery had borrowed this feature of the civil and canon law procedure, the change just referred to would in all probability never have taken place. Instead, however, it adopted the common-law practice of leaving the parties to conduct their pleadings out of court and in their own way; and yet it had none of the machinery necessary to make such a practice workable. Accordingly, what ought to have been anticipated happened, namely, that the pleadings degenerated into a war of words, in which of course neither party was willing to acknowledge defeat by being the first to leave the field.

The court, however, extricated itself from this difficulty in a manner which went far to redeem it from the discredit which had been incurred by falling into it, namely, by requiring each party to tell his entire story in a single pleading, i. e., by requiring the

plaintiff to insert his replication, etc., in his bill, and the defendant to insert his rejoinder, etc., in his answer. As, however, a plaintiff would frequently not be able to foresee what defence the defendant would set up, he could scarcely be required to insert his replication in his bill in the first instance; and accordingly he was given great facility for amending his bill when the answer came in. Moreover, if a plaintiff amended his bill, either by changing the statement of his case or by inserting a replication to the defence set up in the defendant's answer, of course the defendant must have an opportunity to meet such new matter. He could not, however (for a reason which will appear presently), amend his answer, and he was therefore permitted instead to file a further answer.

How then was the subject of discovery managed? In the ecclesiastical courts, as has been seen, each successive pleading contained within itself positions and articles, — the former for the adverse party to answer by way of discovery and the latter for witnesses to answer; and accordingly, when a party answered the positions contained in any pleading of the adverse party, he was said to answer the pleading itself. So also in the Court of Chancery, the defendant was required to answer, by way of discovery, not interrogatories, but the bill itself; and hence it became necessary for plaintiffs, if they would sift the consciences of defendants thoroughly, to insert positions (i. e., charges of evidence) in their bills. Still, this "foreign" mode of extracting information seems never to have become fully naturalized in the Court of Chancery; for plaintiffs were permitted also to insert interrogatories in their bills, and it was the constant practice to do so; and although in theory it was the allegations and charges, and not the interrogatories that the defendant was required to answer, and hence an interrogatory unsupported by a charge might be disregarded, yet this theory was constantly weakening, and there was a constantly increasing tendency to lose sight of it, and to treat the interrogatories as the thing to be answered.[1]

[1] In the first report of the Chancery Commission of 1850, dated January 27, 1852, p. 5, it is said: "With a view to discovery, the Bill contains what is called the interrogating part, in which every statement and charge is converted into a series of questions framed on the principle that the defendant may possibly be a dishonest defendant, disposed to answer evasively, and, therefore, suggesting modifications of the statement or charge. For example, if the statement be of a deed bearing a certain date, and made between and executed by certain parties, in certain words, or to a certain effect, the questions would be whether such a deed of that date or some other and what date, was not made between and executed by such parties, or some, and which of them, or some

In the civil and canon law there was of course no danger whatever of mistaking the answers of a party by way of discovery for a pleading, for neither the positions answered nor the answers to them had any connection with any pleading. In the ecclesiastical courts there was perhaps some danger of this, for, as positions were incorporated with pleadings, it would have been an easy step to incorporate also into one document the answer to a pleading as a pleading, and the answers to it in the quality of positions; but, in fact, this step was never taken, and the two things always remained perfectly distinct. In the Court of Chancery, however, there was unfortunately no distinction made between an answer by way of discovery and an answer by way of defence. Both were, therefore, contained in one document, namely, the answer to the bill, — which, therefore, contained, not only the defendant's entire series of pleadings, but also his answers by way of discovery to the plaintiff's entire series of pleadings contained in the bill; and yet there was nothing whatever in the form of such answer to apprise one that it contained these different and discordant elements.

As a plaintiff often had occasion to amend his bill, on the coming in of the defendant's answer, in order to meet a defence set up in the answer, so he often had occasion to do so for the purpose of changing the statement or his case or his prayer for relief, or for the purpose of changing or adding to his charges of evidence. He would wish to do the former, because of the new light which the answer had thrown upon the case; and he would wish to do the latter, because he was not satisfied with the discovery already obtained, and therefore wished to sift the defendant's

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other, and what parties, in such words, or to such effect, or in some other and what words, or to some other and what effect." In Faulder *v.* Stuart, 11 Ves. 296, Lord Eldon said (p. 301): "Is there such a charge in the bill as to the payment of the consideration as entitles the plaintiff to an answer, not only whether it was paid, but as to all the circumstances, when, where, etc.? I have always understood that general charge enabled you to put all questions upon it that are material to make out whether it was paid; and it is not necessary to load the bill by adding to the general charge that it was not paid, that so it would appear if the defendant would set forth when, where, etc. The old rule was, that making that substantive charge you may, in the latter part of the bill, ask all questions that go to prove or disprove the truth of the fact so stated." It seems, therefore, that, while every interrogatory had to be founded upon a charge, yet a charge and an interrogatory founded upon it might be so drawn that the interrogatory would amplify the charge, and so render an answer to the charge alone insufficient. In this way, therefore, a defendant might be compelled to answer interrogatories.

conscience further. It should be also observed that a bill never lost or changed its identity by amendment, and never ceased to be, at least in legal contemplation, a single document. However often and however much a bill might be amended, it always remained the original bill as amended. An answer, therefore, was never superseded by a subsequent amendment of the bill, but, on the other hand, it would generally be rendered insufficient in point of discovery, and frequently it would be rendered inadequate to the defendant's needs as a pleading. How then could the defendant be compelled to give the further discovery required by the plaintiff, and how could he exercise the right of making the answer as a pleading what he desired it to be? He could not amend the answer because, having been sworn to, it must not be tampered with. What the defendant, therefore, did was to file a further answer, giving such further discovery as was necessary, and making such changes in the first answer as a pleading as he desired to make. Moreover, the first answer and all further answers were filed together, and all constituted in law but one answer to the one bill.

If, on the coming in of an answer, the plaintiff thought it insufficient, i. e., that it was not a full answer to his bill in point of discovery, he excepted to it in writing, i. e., pointed out what parts of the bill were not sufficiently answered, and thereupon the question of the sufficiency of the answer was decided, first by a Master, and then by the court (if necessary) on appeal. If it was decided that the answer was insufficient, the defendant was required to file a further answer, and so on till the bill was fully answered. This was therefore another, and a frequent, occasion for filing a further answer.

What if a bill contained allegations and charges which the defendant was not bound to answer? In the civil and canon law positions which the adverse party was not bound to answer ought not to be filed, and therefore the proper time for taking such an objection to positions was when they were offered to be filed. In the Court of Chancery, however, a defendant would not be entitled to have matter struck out of a bill merely because he was not bound to answer it, and therefore his proper mode of raising the objection was by refusing to answer, and stating in the answer his reasons for so refusing; and then the question would be tried on exceptions to the answer for insufficiency. If the reason why the defendant was not bound to answer did not appear

on the face of the bill, and so required to be proved, the defendant's course was to state in the answer the facts necessary to prove the existence of such reason, and whatever he said on that subject was conclusive against the plaintiff.

If an answer was insufficient, the plaintiff must at his peril except to it within the time prescribed for that purpose, and before taking any other step in the cause, for, if he failed to do so, he would be precluded from saying afterwards that the answer was insufficient; and, moreover, he would have to bring his cause to a hearing with no other discovery than what such insufficient answer contained, as he had let slip the only opportunity of supplying its deficiencies.

A plaintiff was entitled to obtain by answer to his bill, not only such discovery as he would have occasion to use at or before the first hearing of the cause, but also all such as he would have occasion to use after the first hearing, and especially in the Master's office. If, e. g., a bill was one which would require the taking of an account, the plaintiff was entitled, if he made the necessary charges, to any discovery which he could use on the taking of such account, though it was certain that the account would be taken after the first hearing, namely, in the Master's office, and under and pursuant to the decree made at the first hearing. At the same time, this was not the plaintiff's only opportunity of obtaining such discovery, for he could also obtain it when he got into the Master's office, though in a different mode, namely, by filing interrogatories with the Master, and requiring the defendant to answer them.

A very important part of the discovery obtained by a plaintiff in equity consisted of the contents of documents in the defendant's possession; and for the purpose of obtaining such discovery, it was necessary for the plaintiff to insert in his bill a charge of documents, i. e., a charge that the defendant had documents in his possession or under his control which contained evidence in the plaintiff's favor; and this charge the defendant was of course bound to answer. If he admitted that he had such documents, he was required to make and annex to his answer a schedule of them, with such a description of each as would serve completely to identify it. If he claimed, as to any of the documents, that he was not bound to produce them, notwithstanding that they contained evidence in the plaintiff's favor, he stated in his answer that he objected to producing them, giving his reasons, and also stating

such facts as he thought sufficient to prove that these reasons existed, if they did not appear on the face of the bill; and as to the facts so stated the answer was conclusive.

When the answer came in, the first question for the plaintiff to consider was whether the charge of documents was fully answered, and then whether the description of such documents as the defendant admitted to be in his possession, if any, was sufficient; and if the answer was insufficient in either of these respects, the plaintiff must except to it, and follow up the exceptions to their final results before taking any other step.

If the answer was not open to exception, and yet the plaintiff was not satisfied with it, and believed that the defendant had documents to which he was entitled, but which the defendant had not admitted to be in his possession, the plaintiff's only course was to amend his bill by making the charge of documents more specific, and entering into such details as either his knowledge or his imagination could suggest, and so require a further answer. The plaintiff was never permitted to produce affidavits, either to falsify the defendant's answer, or to prove that the defendant had documents to which the plaintiff was entitled; — not to falsify the defendant's answer, for that would not enable the plaintiff to get a better answer, and his proper remedy was to have the defendant indicted for perjury; — not to prove that the defendant had documents to which the plaintiff was entitled, for that could be proved by the defendant's answer alone.

When the plaintiff had got the best answer as to documents that he could get, the next question for him to consider was, whether he was entitled to production. If he thought he was, he applied for an order for production, whereupon the court heard an argument upon the question whether such an order ought to be made, the question depending entirely upon what was contained in the answer.

If the plaintiff was entitled to have certain documents produced, it did not follow that the production should extend to the entire contents of such documents, for the plaintiff was entitled to so much only as was material to his case. In case of books of account, in particular, it would often happen that a few entries only were of any concern to the plaintiff. Whenever, therefore, portions of any document contained nothing to which the plaintiff was entitled, the defendant could seal up all such portions, annexing to the document an affidavit stating that the portions

sealed up contained nothing revelant to the plaintiff's case. This, as the writer believes, was the only instance in which, by the practice of the Court of Chancery, a right to discovery was allowed to depend upon an affidavit; and, indeed, the affidavit in this instance was considered as a part of the answer.

If a bill was clearly bad on its face (i. e., if, assuming everything stated in the bill to be true, the plaintiff would clearly be entitled to no relief), the defendant ought not to be required to answer it by way of discovery; and yet it was not obvious how he could secure an exemption from answering it, as the question upon which the right of exemption depended could not regularly be decided until the hearing of the cause. In the ecclesiastical courts this difficulty could not arise, for, if a pleading were clearly bad, the adverse party could (as has been seen) procure its rejection by the court; but in the Court of Chancery a plaintiff was entitled to file any bill which his counsel would sign. To meet this difficulty, therefore, demurrers were borrowed from the common law. They were not borrowed, however, with all their consequences. The most important consequences of a demurrer at common law depended upon the principle of constructive admissions, and that principle was not borrowed at all with demurrers. In consequence of that principle, a demurrer at common law raised the question which of the parties was entitled to judgment upon the facts stated in the pleadings, and constructively admitted by the parties respectively to be true, — whereas, in the absence of that principle, a demurrer in the Court of Chancery merely raised the question whether, assuming the statements in the bill to be true, such legal consequences followed from them that the defendant ought to be required to answer them by way of discovery. Accordingly, the only consequence which followed from a decision upon a demurrer in the Court of Chancery was that the defendant was or was not bound to answer the bill. If the decision was in favor of the bill, an order was made overruling the demurrer, and the defendant was then required to answer, just as if no demurrer had been interposed. If the decision was against the bill, an order was made allowing the demurrer, and then the plaintiff could obtain no answer to the bill, unless he amended it, and without an answer he could take no further step in the suit.

Was it a good reason for not requiring a defendant to answer a bill by way of discovery, that his answer had set up a good affirmative defence to the bill, and therefore the discovery would be use-

less? No, clearly not; for, first, it would still be necessary for the plaintiff to prove his bill before the defendant could be called upon to prove his affirmative defence; secondly, it could not be known that the defendant would be able to prove his affirmative defence, and, if he failed to prove it, the plaintiff would of course be entitled to a decree upon proving his bill. It is, however, equally clear that a defendant to an action at law, who pleaded by way of confession and avoidance only, would not have to give discovery as to any of the traversable facts alleged in the declaration, as none of those facts would, under any circumstances, have to be proved, they all being constructively admitted to be true. Moreover, it was at least a fair question whether it would not be conducive to justice to give to a defendant in the Court of Chancery the option of admitting constructively (i. e., by not denying them) those allegations in the bill upon which the equity[1] of the bill depended, instead of answering the bill by way of discovery. At all events, this question was raised by those who presided in the Court of Chancery, and they answered it in the affirmative; and, for the purpose of affording to defendants such an option, pleas were borrowed from the common law, and defendants were given the option of defending by an answer or by a plea. As, however, the principle of constructive admissions was not borrowed at all with demurrers, so it was borrowed only in part with pleas; for unless and until a plaintiff took issue upon a plea, it had only the effect of a demurrer. Like a demurrer, it had to be set down by the defendant for argument immediately on being filed, and as upon the argument of a demurrer the question was whether the bill was good upon its face, so upon the argument of a plea the question was whether the plea was good upon its face. If the decision was against the plea, an order was made overruling it, and then the defendant had to answer, just as if he had not pleaded at all. If the decision was in favor of the plea, an order was made allowing it; and then the plaintiff had no choice but either to take issue upon the plea, or to abandon the suit. If he did the former, then the pleadings were at an end, and the cause was ready for the taking of testimony, and from that moment all the facts alleged in the bill which were necessary to its support stood admitted, and the only question to be tried was whether or not the plea was true; and as to that, of course the

[1] The allegations in a bill upon which the equity of the bill depends correspond to the issuable or traversable allegations in a declaration. See *supra*, p. 149, note.

defendant had the burden. At the hearing, if the plea was proved, the defendant won the suit, and the bill was dismissed. If the plea failed of proof, a decree was made upon the facts admitted by the defendant, declaring the plaintiff to be entitled to relief, and referring the cause to a Master to ascertain and report the kind and amount of relief to which the plaintiff was entitled. On the reference, as the plaintiff would have the burden, he would be entitled to discovery, and he would obtain it by filing interrogatories with the Master, and requiring the defendant to answer them.

It has been assumed that the plea was affirmative; but the principles applicable to a negative plea were the same, subject to these differences; namely, that, upon a negative plea, the defendant's constructive admissions were limited to facts not denied by the plea; that the contest was not upon new facts alleged by the defendant, but upon a fact alleged in the bill and denied by the plea, and as to which, therefore, the plaintiff was entitled to discovery, notwithstanding the plea; and that the plea therefore required the support of an answer. It must not be supposed, however, that an affirmative plea always protected the defendant from answering the bill at all by way of discovery; for the bill might contain an affirmative replication to the defence set up by the plea, or it might contain charges of evidence in disproof of the plea, and in either case (unless, indeed, in the first case, the affirmative replication was constructively admitted by an affirmative rejoinder) the plea would require the support of an answer as to the replication or the charges of evidence. It would seem also that upon principle every plea required the support of an answer as to any allegations or charges in the bill which constituted no part of its equity, but which affected merely the amount or kind of relief to which the plaintiff would be entitled, since there was no constructive admission of any such allegations or charges, and therefore as to them it was immaterial whether the defence was by plea or by answer. This view, however, was never adopted by the Court of Chancery.

It may be observed that, when a defendant pleaded to a bill, and also answered in support of the plea, the plea and the answer were both contained in one document, the answer following the plea.

It will be seen that no question could ever arise as to the time at which a plaintiff was entitled to discovery in the Court of Chancery; for there was but one time when he could have it, namely, immediately on filing the bill, and before any other step was taken in the suit; or perhaps it should rather be said that a plaintiff had no

other opportunity to obtain discovery until he obtained a decree, and got into the Master's office.

Nothing has been said hitherto as to discovery in Chancery by the plaintiff in favor of the defendant, and yet a defendant had the same rights in respect to discovery that a plaintiff had. But it is to be observed that the Lord Chancellor enforced discovery, even by the defendant in favor of the plaintiff, not by virtue of any inherent power of his own, but by virtue of the power of the Crown wielded by him. Indeed, the command to a defendant, by virtue of which he was compelled to answer the bill, though issued under the direction of the Lord Chancellor, was not only in the name of the King, but was contained in a writ under the Great Seal (i. e., the writ of *subpœna*), and no such writ could issue against a plaintiff as such, unless he had incurred some default or liability in the suit itself, and he could not incur any default or liability for not giving discovery, so long as no command was laid upon him to give it. He had come into the court voluntarily, complaining of the defendant, and seeking relief against him, and the defendant as such was in no condition to complain against him. Moreover, the only mode of giving discovery known to the Court of Chancery was by answer to a bill filed, and a bill could be filed only by a plaintiff as such. If, therefore, a defendant wished to obtain discovery from the plaintiff, he must make himself a plaintiff by filing a bill, and must make the original plaintiff a defendant to that bill, and must thereupon procure a writ of *subpœna* to be issued and served upon him, commanding him to answer the bill; and as the sole purpose of such a bill would be to obtain discovery in aid of the plaintiff's defence to the original bill, of course it would ask for no relief, and so would be a bill for discovery merely; and thus we are brought to the subject of bills for discovery.

Such bills are divisible into three classes, namely, bills in aid of actions at law, bills in aid of defences to actions at law, and bills in aid of defences to bills in equity, though the last two may for many purposes be regarded as one. They all present very serious difficulties, both theoretically and practically, — difficulties too which have never been satisfactorily solved. Every bill for discovery is anomalous in this, namely, that it seeks discovery, not to aid in the proof of the bill itself, but to be used in another suit, and in proof of facts with which the bill has no concern. A suit might indeed, without any flagrant violation of principle, be brought for the purpose of obtaining discovery to be used in another suit, but

the discovery would then be the final object of the suit, and so would be what relief is upon a bill for relief, and accordingly should be given by a decree.[1] The question, and the only question, to be tried upon such a bill is whether the plaintiff is entitled to the discovery which he seeks, just as, upon a bill for relief, the question to be tried is whether the plaintiff is entitled to the relief which he seeks; and, therefore, the bill should state, not the facts as to which the discovery is sought, but the facts upon which the right to discovery depends, and the only part of the bill which should contain any reference to the facts as to which discovery is sought is the prayer, i. e., the prayer for discovery. The plaintiff would of course be entitled to an answer to the bill by way of discovery, but it would be as to the facts upon which the right to the principal discovery depended.

An inquiry into the nature of the right upon which a bill for discovery is based will lead to the same conclusion. What is that right? Surely it is the right to have discovery, just as the right upon which a bill for relief is based is the right to have relief, though there are so many varieties of the latter right that it requires to be subdivided. There is of course no legal right to have discovery, but there are numberless bills in equity which have no legal right to rest upon, and which nevertheless will lie. Why? Because the interests of justice require that they should, and therefore equity raises a right upon which they can rest; and bills for discovery are instances of such bills. It is true that a right to discovery will not support a bill, if the discovery is wanted merely for the purpose of obtaining relief in equity; for the right to discovery is then merely incidental to the right to relief, and both must be obtained in the same suit. But where the discovery is to be used in one suit, and must be obtained in another suit, the right to discovery is necessarily a principal right, and there is no reason why it should not support a bill.

Still, the Court of Chancery never adopted any of the foregoing views; nor could it well do so, so long as it adhered to its practice of requiring a defendant to a bill for discovery to give the discovery sought in his answer to the bill. An attempt was also made by the court to reconcile its practice with principle by adopting a different view from that suggested above, as to the right upon which the bill was founded; namely, that, when it was in aid of an

[1] See *infra*, page 219, last sentence.

action, it was founded upon the same right as that upon which the action was founded, and that, when it was in aid of a defence, it was founded upon such defence. Accordingly, it was held that a bill for discovery in aid of an action should be framed in the same manner as if the plaintiff were seeking relief in equity as well as discovery, except that the prayer must stop short with asking for discovery, instead of going on and asking for relief also. Hence, if the bill did not state such facts as showed the plaintiff to be entitled to recover at law, it was open to a demurrer; and if any fact necessary to the cause of action was untrue, or if the defendant had an affirmative defence to the cause of action, he could successfully plead to the bill. So also, if the bill was in aid of a defence, it was held that the defence must be stated fully, and that the question whether or not it was a good defence could be raised by demurrer; and consistency required the court also to hold that such a bill could be pleaded to in the same manner as a bill in aid of an action.

It will be seen, therefore, that the court shut its eyes to the fact that the discovery sought by the bill was to be used in another suit, and acted as if it were to be used in the same suit, namely, for the establishment of the case or defence which was the subject of it; and perhaps it would be too much to say that the court could not, if it saw fit, adopt that view in respect to bills in aid of actions;[1] but how could it possibly do so in respect to bills in aid of defences? A defence, simply as such, will not support a bill; and yet there is nothing else to support the bill, in the case now supposed, except the right to discovery, and the latter is sufficient to support the bill without defence, and it is not aided by the defence; and the only object in stating the defence is to obtain admissions respecting it by way of discovery. Indeed, if the discovery could be obtained by means of interrogatories, there would be no occasion whatever for stating the defence in the bill. But what seems to be conclusive is the fact that the defence in aid of which the discovery is sought may be merely a negative, and so incapable, for that reason, of supporting a bill.

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[1] And yet the adoption of such a view in any case involves the absurdity of holding that a suit may terminate with the answer to the bill, and yet accomplish every purpose for which it was instituted; and a greater absurdity there could not well be. The pleadings in a cause are a means, — not an end; and a judgment or decree, or at least an act of the court of some kind, is the only instrumentality by which the final object of a suit can be obtained.

Moreover, it may well be doubted whether the Court of Chancery was well advised in adopting the view that it did as to a bill for discovery in aid of an action; for a consequence of it was that the court was constantly called upon to decide upon the merits of a controversy for the mere purpose of ascertaining whether or not the plaintiff was entitled to discovery; and if the defendant pleaded to the bill, and the plaintiff took issue upon the plea, it would be necessary, for the same limited purpose, to incur all the expense and delay of bringing the cause to a hearing. It may also be stated, as a minor objection, that a consequence of the view adopted was that, upon every bill for discovery in aid of an action, discovery had to be given as to all the facts of the plaintiff's case, instead of being limited to the plaintiff's actual needs, i. e., to the issue or issues about to be tried.

Another consequence of the view adopted (though it may not have been an objection to it) was, that a bill for discovery could be filed as soon as the cause of action or the defence which was the subject of it accrued, and it was immaterial whether the action or suit, in which the discovery was to be used, had been instituted or not, while a consequence of adopting the other view would have been that the bill could not be filed till the action or suit in which the discovery was to be used had been brought and was at issue.

It has always been supposed to be another consequence of the view that was adopted, that every suit for discovery terminated the moment it was judicially ascertained that the defendant had fully answered the bill; and hence that there could never be any taking of testimony, nor any hearing, nor any decree, in such a suit; and it is true that an answer always terminated the suit, if the plaintiff succeeded in obtaining one, for an answer gave the plaintiff all he wanted, and all he could get. But if the defendant pleaded to the bill, and his plea was allowed, the plaintiff could never get an answer; and yet he could reply to the plea, and thus put the cause at issue, and if he did so he would then be entitled to take testimony and bring the cause to a hearing, and if he succeeded at the hearing he would be entitled to discovery, and as it would be too late to obtain it by answer, the court would have to make a decree directing that the defendant answer interrogatories in the Master's office.

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[*To be continued.*]